Supreme Court, U.S.
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No. 94-749

IN THE

Supreme Court of the United States

OCTOBER TERM 1994

JOHN J. HURLEY, *et al.*,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Judicial Court of The Commonwealth of Massachusetts

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BRIEF *AMICUS CURIAE* FOR ANTI-DEFAMATION LEAGUE, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GAY, LESBIAN & BISEXUAL VETERANS OF AMERICA, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL CENTER FOR LESBIAN RIGHTS, PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

WALTER A. SMITH, JR.*
THOMAS N. BULLEIT, JR.
WILLIAM P. FLANAGAN
THOMAS E. JOAQUIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600
Counsel for Amici Curiae

* Counsel of Record

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are all long-standing, vigorous supporters of the First Amendment. They are equally long-standing and vigorous supporters of laws prohibiting invidious discrimination. They therefore have an interest in ensuring that the vitality of the First Amendment and of

anti-discrimination laws is not lessened by the pretextual invocation of one to avoid the force of the other. In this case, *amici* believe that the asserted conflict between these two fundamental protections is a false one because petitioners were not engaged in protected First Amendment activity as organizers of the St. Patrick's Day/Evacuation Day Parade. *Amici* therefore urge affirmance of the Massachusetts Supreme Judicial Court. If the Court takes the contrary view that this parade had expressive value -- or that all parades do -- then *amici* urge the Court to limit its holding to the parade context.

The *Anti-Defamation League* ("ADL") is one of the nation's oldest civil rights and human relations organizations, founded in 1913 to combat anti-Semitism and to promote good will among all races, ethnic groups, and religions. ADL's ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens. For eight decades the ADL has actively combated discrimination in employment, housing, education, and public accommodations.

Disability Rights Education and Defense Fund, Inc. ("DREDF") is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy, and law reform. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national organization committed to achieving full recognition of the rights of lesbians, gay

men, and people with HIV/AIDS, through impact litigation, education, and public policy work. Lambda has defended the First Amendment rights of lesbians and gay men in many cases and has advocated for the rights of gay men and lesbians under state and local anti-discrimination laws across the country. For more than twenty years, Lambda has been a strong proponent of First Amendment freedoms and of rights of equal opportunity and has a vital interest in securing the protection of both for lesbians and gay men.

Gay, Lesbian & Bisexual Veterans of America ("GLBVA"), founded in 1990, is dedicated to meeting the needs and answering the concerns of active, reserve, and veteran members of the military services who are gay, lesbian, or bisexual. GLBVA's is the only national veterans organization engaged in outreach to active, reserve, and veteran servicemembers who have been marginalized because of their sexual orientation.

The *Mexican American Legal Defense and Educational Fund* ("MALDEF") is a nonprofit national civil rights organization founded in 1968 and headquartered in Los Angeles. MALDEF's principal objective is to secure and to protect the civil rights of Latinos living in he United States. MALDEF pursues this objective through litigation and advocacy primarily in the areas of education, employment, political access, immigrants' rights, language rights, and access to justice.

The *National Center for Lesbian Rights* ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm founded in 1977 and devoted to the legal concerns of women and men who encounter discrimination on the basis of sexual orientation. NCLR attorneys regularly litigate in the area of civil rights as it applies to lesbians and gay men.

The *Puerto Rican Legal Defense and Education Fund* ("PRLDEF") was founded in 1972 to protect and ensure

the civil rights of Puerto Ricans and other Latinos. PRLDEF opposes invidious discrimination in all forms. PRLDEF is a strong defender of our country's anti-discrimination laws and of the First Amendment.

The *Women's Bar Association of Massachusetts* ("WBA") is a statewide professional organization committed to the protection of the rights of women before the court system and regulatory bodies, in the state and federal legislatures, and in society generally. The WBA has filed *amicus* briefs with the state and federal courts in matters involving sex and sexual orientation discrimination, sexual harassment, and equitable treatment of women by the courts, legislatures, and regulatory bodies.

The *Women's Legal Defense Fund,* founded in 1971, is a national advocacy organization that works at the federal and state levels to develop and promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families.

Amicus curiae have obtained consent to file this brief from all parties of record, and the letter of consent has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court has long recognized the bedrock importance of the First Amendment. But it has never held that a parade is *per se* protected by the First Amendment or that the mere assertion that an activity is expressive insulates a party from the force of other laws. Instead, the Court has required a threshold showing that the activity was in fact intended to express a viewpoint and was likely to be understood as such by others. Any other rule would create a near limitless First Amendment exception to all laws, including anti-discrimination laws enacted to fulfill this nation's promise of equality.

In this case, petitioners sought to exclude certain individuals from a privately-sponsored parade otherwise open to the entire community, *i.e.*, those who identified themselves as gay or lesbian were given the choice of either hiding their identity or staying away. *Amici* would have thought that this kind of hateful exclusion was at odds with the values of both the First Amendment and our country's anti-discrimination laws. Indeed, the lower courts in this case simply applied this Court's well-settled First Amendment jurisprudence to conclude that the exclusion was not expressive activity protected by the First Amendment. Rather, the finding of the trial judge, affirmed by the highest court of Massachusetts, was that the First Amendment was invoked in a pretextual manner. These findings of pretext, turning on witness credibility, deserve deference under any standard of review and are dispositive of the issue before the Court.

In order to evade these factual findings, petitioners ask the Court to hold as a matter of law that parades are always *per se* speech. This request is not consistent with the Court's precedents. The strong policies embedded in our anti-discrimination laws cannot be evaded simply because the conduct involves marching down a street.

Amici recognize that the Court may accept the invitation to hold for the first time that private parades are pure speech as a matter of law. Alternatively, the Court may conclude that the Massachusetts lower courts erred in finding as a factual matter that *this* parade was not an expressive activity of petitioners under the First Amendment. Under either of these scenarios, *amici* would freely concede that the expression of private parade organizers may necessitate the exclusion of marchers whose message is inconsistent with the expressive message or messages of the organizers because of the importance justifiably attached to allowing speakers broad latitude to define their own messages.

But even if the Court reaches this result, it should save for another day any questions about any potential tension between the First Amendment and anti-discrimination laws in other settings. This is because parades are atypical of the contexts in which anti-discrimination laws are generally applied. In discrimination cases involving the workplace, housing and most public accommodations, the issue can seldom be cast as a pure conflict of messages, and discriminatory conduct can rarely if ever be defended as a necessary adjunct to pure speech. Accordingly, the holding of this case should not purport to decide the respective weight given to First Amendment and anti-discrimination concerns in such other contexts.

ARGUMENT

I. UNDER TRADITIONAL FIRST AMENDMENT JURISPRUDENCE, NO FIRST AMENDMENT RIGHT IS PRESENTED IN THIS CASE.

First Amendment guarantees are at the core of a free Nation. They are in fact the guarantees that make all our other constitutional guarantees possible. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Accordingly, this Court has broadly construed the First Amendment's protections, determining that they reach not only speech, *see, e.g., Cantwell*, 310 at 309-311, but also some conduct, *see, e.g., Texas v. Johnson*, 491 U.S. 397, 406 (1989), and expressive association. *See, e.g., NAACP v. Claibore Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424, U.S. 1 (1976); *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). Indeed, certain expressive activity -- including many parades -- indisputably *may* be protected under the First Amendment if "[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (*quoted in*

Texas v. Johnson, 491 U.S. at 404). By the same token, the activities of certain cohesive groups or associations *may* be protected by the First Amendment if they are organized for a specific expressive purpose. *See City of Dallas v. Stanglin*, 490 U.S. 19 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Hishon* v. *King & Spalding*, 467 U.S. 69, 79 (1983).

The Court has held, however, that the determination whether conduct in fact is expressive or whether the association in fact has an expressive purpose sufficient to implicate the First Amendment is a matter to be resolved under the facts and circumstances of each particular case. *Roberts,* 468 U.S. at 620. "It is . . . necessary to determine whether [an] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence*, 418 U.S. at 409. Moreover, the Court has made clear that the party *seeking* constitutional protection for otherwise unlawful conduct must as a threshold matter establish its involvement in protected expressive activity. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n.5 (1984). Absent this showing, the Court has ruled that the First Amendment is not implicated.

Any other rule obviously would create a gaping First Amendment exception to the violation of *any* law. For "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) (emphasis in original); *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (refusing to accept that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); *see also Johnson*,

491 U.S. at 403; *Stanglin*, 490 U.S. at 25. Thus, as this Court has explained, *every* human activity involves "some kernel of expression," but not *every* activity thus gains the extraordinary protections of the First Amendment. *Stanglin*, 490 U.S. at 25.

Under these settled principles, the Massachusetts courts correctly found that *no* First Amendment right is presented in this case and, therefore, that no collision between the First Amendment and anti-discrimination laws is presented. Rather, as the trial judge and the Massachusetts Supreme Judicial Court found, the record does not support the contention that petitioners' conduct through the parade was intended "to convey a particularized message," nor that the "likelihood was great" that their "message" would be understood by those who viewed it. *See* J.A. at C13-15; *see also Spence,* 418 U.S. at 409-11; *Johnson*, 491 U.S. at 404. Moreover, no First Amendment association right was shown because, as the state court found, it was "impossible to discern any specific expressive purpose entitling the Parade to protection . . . ." J.A. at B25; s*ee, e.g., Roberts*, 468 U.S. at 618; *New York State Club Ass'n,* 467 U.S. at 13. Although petitioners argue that the trial court improperly examined their "expression" and found it to be too garbled and broadly-focused for First Amendment protection, Petitioners' Brief at 16-19, the truth is that the court carefully examined the purported speech and found that, for the purposes of the First Amendment, petitioners did not use the parade as a vehicle *for their own expression.* J.A. at C12-C13.

Rather, the court found petitioners' invocation of the First Amendment to be pretextual. J.A. at C6 ("The [trial] judge concluded that the inconsistent and changing explanations for excluding GLIB demonstrated the 'pretextual nature' of those explanations.") This finding, based on firsthand assessments of witness credibility, deserves deference from this Court under any

standard of review. *Hernandez v. New York,* 500 U.S. 352, 366-69 (1991).

In an effort to avoid these findings of fact, petitioners propose that this Court -- for the first time -- hold as a matter of law that *every* privately sponsored parade is protected as *per se* speech under the First Amendment. They argue further that a state should be powerless to enforce an otherwise applicable anti-discrimination statute against any group sponsoring such an activity. Thus, under petitioners' view, *every* parade -- even those solely for amusement or commercial promotion -- are *always* inherently expressive and therefore exempt from anti-discrimination laws.

This argument has no support in this Court's jurisprudence. This Court has never construed the First Amendment categorically to protect any particular conduct or activity, including a parade. Furthermore, none of the cases cited by petitioners provides that all parades or marches -- or any other activities for that matter -- are *per se* protected by the First Amendment. To the contrary, this Court has held that parades are *not* "pure speech" for purposes of First Amendment protection, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969), and that while parading and marching "*may* nonetheless constitute methods of expression, entitled to First Amendment protection," that is so only if the marchers establish the existence of *expressive activity*. *Id.* (emphasis added).[1] The Court has furthermore held that "'[t]he First and Fourteenth Amendments [do not] afford the same kind of freedom

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[1] Indeed, in 1995, the Council was permitted to exclude respondents from the parade by a Federal District Court judge, who found that the Council in 1995 had the requisite expressive purpose that was absent in 1993. *South Boston Allied War Veterans Council v. City of Boston,* ___ F. Supp. ___, 1995 WL 40641 at *25 (D. Mass. Jan. 17, 1995); *see also, e.g., Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 286-90 (D. Md. 1988).

to those who would communicate ideas, or conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.'" *Id.* (*quoting Cox v. Louisiana*, 379 U.S. 536, 555 (1965)).

Petitioners concede, based on these precedents, that the expressive activity of parties claiming First Amendment protection must be examined by the court -- through an "individualized, fact-specific inquiry" -- to determine whether the activity falls within the First Amendment's protections. Petitioners' Brief at 20 (*citing Roth v. United States*, 354 U.S. 476 (1957)). Such an "inquiry" occurred in the lower courts and was resolved against petitioners. Having lost as a factual matter, petitioners now seek a *per se* rule, but they have offered the Court no persuasive reason why all parades should be declared *per se* protected by the First Amendment or why courts should conduct no factual inquiries whenever parades are at issue.

In fact, no good reason supports such a result. Judicial factfinding into the legitimacy of First Amendment claims is an important safeguard against unjustified discrimination. Furthermore, this Court has given consistently broad effect to legal efforts to curb invidious discrimination[2] and, along with the lower courts, is well-versed in determining whether explanations offered in defense of discrimination claims are pretextual. Here, the First Amendment defense found pretextual by the lower courts should not now be accepted by this Court. Accordingly, because petitioners offer no justification for departing from this Court's cases, and have not refuted the factual findings of the

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[2] Time and again, this Court has made clear that anti-discrimination statutes are part of "a firm national policy" of this country, *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983), and that ensuring nondiscriminatory access and opportunities in our society is a "profoundly important goal." *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in judgment).

lower courts, the Court should reject petitioners' argument and affirm the decision below.

II. IF THE COURT FINDS A FIRST AMENDMENT INTEREST PRESENTED, THE COURT SHOULD MAKE CLEAR THAT ITS HOLDING IS LIMITED TO THE CONTEXT OF PRIVATE EXPRESSIVE PARADES.

Amici agree that would-be participants in private, genuinely expressive parades may be excluded if their participation would conflict with the expressive purpose of the parade. Thus, for example, a gay and lesbian pride parade may exclude those bringing a message of antipathy toward lesbians and gay men.

But if the Court decides that respondents in this case were properly excluded from the parade in order to protect the integrity of the parade's message, *amici* urge the Court to limit its holding to the context of private parades. For even if the Court holds that parades are *per se* expressive or presumptively so, virtually no other public accommodation, private employer, or landlord could validly make a similar claim about its activities. Accordingly, whatever rule applies to "pure speech" or expressive parades would be ill-suited to such cases. *See, e.g., Baliko v. Stecker*, 645 A.2d 1218 (N.J. Super. Ct. App. Div. 1994) (First Amendment raised to defend sexual harassment in union picketing); *Cass v. American Properties, Inc.*, 1979 (*sic*) WL 44668 (N.D. Ill. Feb. 27, 1995) (racially discriminatory conduct under the Fair Housing Act not protected under First Amendment).

This Court has repeatedly made clear that the First Amendment cannot be used as a talisman to protect a party from the reach of anti-discrimination laws. Rather, in the absence of a clear showing that discrimatory conduct was expressive in purpose and operation, the Court has not found a First Amendment right established at all. *See, e.g., Hishon v. King & Spalding*, 467 U.S. at 78 (rejecting argument that application of Title VII in

case where female was denied a partnership "would infringe [upon the] constitutional rights of expression or association"); *Norwood v. Harrison*, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections"); *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2546 (1992) ("sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

No departure from these decisions should be intimated here, as it would leave the country's commitment to equal opportunity unnecessarily at risk. *See Roberts*, 468 U.S. at 634 ("The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex") (O'Connor, J., concurring in part and concurring in judgment). Accordingly, if the Court reverses in this case, it should make clear the narrowness of its holding and its continuing commitment to laws protecting equal opportunity.

CONCLUSION

For all these reasons, the Court should affirm the lower court's decision. If the Court resolves this case against respondents, it should make clear that its holding is confined to the specific circumstances of a parade.

Respectfully submitted,

WALTER A. SMITH, JR.*
THOMAS N. BULLEIT, JR.
WILLIAM P. FLANAGAN
THOMAS E. JOAQUIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

* Counsel of Record

Counsel for Amici Curiae